UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

A.T. HUDSON & CO., INC.,	)	
	)	
Plaintiff	)	
	)	
v.	)	*Civil No. 89-0110 P*
	)	
MARK A. GRINDELAND, et al.,	)	
	)	
Defendants	)	

MEMORANDUM DECISION ON MOTION TO STRIKE AND RECOMMENDED DECISION ON MOTIONS FOR SUMMARY JUDGMENT

In this diversity action the plaintiff complains that defendants Mark A. Grindeland (``Grindeland") and Elliott J. Berv & Associates (``Berv") caused it irreparable harm and seeks monetary and injunctive relief. Counts One and Two allege that Grindeland breached several provisions of an employment contract between the parties as well as his fiduciary duty to the plaintiff. Count Three alleges that Berv wrongfully induced Grindeland to breach his contract with the plaintiff. Counts Four and Five allege that both defendants misappropriated trade secrets and conspired in unfair trade practices. Count Six asks for monetary and injunctive relief. The defendants have each filed a motion for summary judgment on all counts against them. In addition, the defendants have jointly filed a motion to strike material filed in support of the plaintiff's opposition to the defendants' motions for summary judgment.

I. Motion to Strike

The defendants have moved to strike the Declaration of Kathy Purvis[1] and the Affidavit of Joseph Murphy for failure to comply with Fed. R. Civ. P. 56(e). Rule 56(e) states in relevant part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Id.

[1] A declaration signed under penalty of perjury has the same force and effect as a sworn affidavit. 28 U.S.C. ' 1746.

The defendants first argue that Purvis's declaration should be stricken in its entirety because it fails to state that the contents were made on personal knowledge. Whether the Rule 56(e) requirement of personal knowledge has been met may be inferred from the affidavit itself. *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990). Thus, the failure to state that the information contained in an affidavit is based on personal knowledge does not affect its validity. It is reasonably inferred from the language contained in Purvis's declaration that most of the statements contained therein are based on personal knowledge. Two statements, however, do not comply with the rule. The last sentence of paragraph 10 and all of paragraph 13 of her declaration are based not on personal knowledge but rather on belief or undisclosed sources.[2] Accordingly, these statements must be stricken. *See* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ' 2738 at 509 (1983).

[2] The last sentence of paragraph 10 states: ``After these conversations, Mr. Grindeland formally quit his job at A.T. Hudson and, I believe, reported to work with Berv at the First NH project several days later." Paragraph 13 relates information from an undisclosed source about Berv's prior management consulting experience.

The defendants also contend that the information contained in paragraphs 7-10 of the Purvis declaration is lay opinion or hearsay which would be inadmissible at trial. The plaintiff argues that the statements attributed to Grindeland are admissions of a party-opponent and as such are not hearsay and that a lay witness may testify in the form of opinions to matters within her personal knowledge. A statement is not hearsay if it is an admission of a party-opponent. Fed. R. Evid. 801(d)(2). To constitute such an admission the statement must be ``offered against a party and [be] . . . the party's own statement in either an individual or a representative capacity." *Id.* The statements at issue are those of Grindeland, a party-opponent, and are offered against him. These statements would be admissible in evidence and therefore comply with the requirements of Fed. R. Civ. P. 56(e).[3] In addition, any statements in the declaration in the form of opinions which are based on the declarant's personal knowledge are clearly admissible. *See* Fed. R. Evid. 701. Accordingly, the defendants' motion to strike the Declaration of Kathy Purvis is ***GRANTED*** as to the last sentence of paragraph 10 and all of paragraph 13 and is otherwise ***DENIED***.

The defendants contend that Joseph Murphy's affidavit should be stricken because it does not appear from its face that it was made on personal knowledge and that the affidavit asserts legal conclusions and not facts. I agree. ``The affidavit is no place for ultimate facts and conclusions of law, nor for argument of the party's cause. . . . Mere denials of the other party's allegations or restatements of the party's own allegations in the affidavit should be disregarded by the court." 6 (part 2) *Moore's Federal Practice* & 56.22[1] at 56-746-47; *see also* 10A C. Wright, A. Miller & M. Kane,

[3] The defendants argue that if these statements are admissible at all they are admissible only against Grindeland and not Berv. The plaintiff argues that these statements are admissions made in furtherance of a conspiracy and as such are admissible against both parties. *See* Fed. R. Evid. 801(d)(2)(E). I conclude that for summary judgment purposes the statements are encompassed within Fed. R. Evid. 801(d)(2)(E) because they could be construed as statements of a co-conspirator in furtherance of a conspiracy and are therefore also admissible against Berv.

Federal Practice and Procedure ' 2738 at 486-94 (1983). Joseph Murphy's affidavit is void of any information which appears to be based on his personal knowledge. *See, e.g., Antonio v. Barnes*, 464 F.2d 584 (4th Cir. 1972). The affidavit contains no foundation for Murphy's personal knowledge concerning Grindeland's training and knowledge. The remainder of the affidavit consists simply of conclusory facts and legal argument based entirely on information garnered from the Declaration of Kathy Purvis. Accordingly, the defendants' motion to strike the Affidavit of Joseph Murphy is ***GRANTED***.

II. Motions for Summary Judgment

A. Individual Claims Against Grindeland

Grindeland argues that he is entitled to summary judgment on the claims against him individually because: (1) he did not breach the employment contract (``contract") between himself and the plaintiff; (2) the non-competition provision of the contract is void; and (3) he did not breach any fiduciary duty to the plaintiff. The plaintiff contends that the non-competition provision of the contract is valid and that Grindeland breached both that clause as well as other clauses of the contract.

As a federal court sitting in a diversity action, this court must apply the choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941). However, when a case has been transferred from one forum to another, the transferee forum will apply the law ``that would have been applied if there had been no change of venue." 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* ' 3846 at 233 (1976); *see also Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964). In New Jersey parties to a contract may expressly choose the state law governing their agreement. *Kalman Floor Co. v. Jos. L. Muscarelle, Inc.*, 481 A.2d 553, 555-56 (N.J. Super.

App. Div. 1984), *aff'd*, 486 A.2d 334 (N.J. 1985). The contract between Grindeland and the plaintiff provides that its provisions shall be construed under the laws of New Jersey. *See* contract at & 10 (found at Exh. A to Affidavit of James Conneen). Accordingly, this court will apply New Jersey law to determine the validity of the disputed non-competition provision.

New Jersey has recognized that an employee's post-employment restrictive covenant is ``enforceable to the extent that it is reasonable under all the circumstances of the case. [It] will be found to be reasonable when it protects the `legitimate' interests of the employer, imposes no undue hardship on the employee, and is not injurious to the public." *Karlin v. Weinberg*, 390 A.2d 1161, 1166 (N.J. 1978) (citations omitted). The non-competition provision states in relevant part:

> 5. For a period of two (2) years after you leave the employ of the Company, you will not, directly or indirectly, for yourself or for any other Business Entity, solicit any business from, or render any services to:
>
> . . . .
>
> (d) Any Business Opportunity[4] which you learned of [] during the period of six (6) months immediately preceding the termination of your employment.

Contract at & 5. Grindeland contends that this provision of the contract is void because the scope of its protection exceeds the legitimate interests of the employer and imposes an undue hardship on the employee. The plaintiff contends that this provision is reasonable under the circumstances and that it has a legitimate interest in protecting its ``business opportunities" because of the time and effort required to cultivate clients. *See* Plaintiff's Memorandum in Opposition to Defendants' Motions for

[4] Business Opportunity is defined as ``a Business Entity which requires or is seeking to acquire services of the general nature provided by the company." Contract at & 2(c).

Summary Judgment at 8-9 (citing *A.T. Hudson & Co. v. Donovan*, A-2801-85T1 (App. Div. Super. Ct. N.J. Feb. 2, 1987) (Exh. A to Plaintiff's Statement of Disputed Material Facts)).[5]

Although an employer has a legitimate interest in protecting pre-existing and potential customers with whom the employer has had substantial contact, *see Karlin*, 390 A.2d at 1166; *Whitmyer Bros., Inc. v. Doyle*, 274 A.2d 577, 581 (N.J. 1971); *Solari Indus., Inc. v. Malady*, 264 A.2d 53, 61 (N.J. 1970), it does not have a legitimate interest in preventing competition as such, *Whitmyer Bros., Inc.*, 274 A.2d at 581. In the non-competition clause at issue an employee is prohibited from rendering any services to any business opportunity which he learned of during the six-month period immediately preceding the termination of his employment, even though the company has had no contact with that entity.

[5] The plaintiff also argues that the New Jersey Superior Court has already upheld the validity of this section, citing *Donovan*. The court in *Donovan*, however, decided that paragraph 5(a) of the non-competition agreement is valid under New Jersey law; it did not address the validity of paragraph 5(d). While *Donovan* may be informative, it is not determinative of the issue in this proceeding.

The New Jersey Supreme Court has repeatedly emphasized that it is willing to enforce a non-competition covenant to restrict a terminated employee's dealings with his former employer's current and potential customers only to the extent that he had substantial dealings with such customers on his former employer's behalf while in that employer's employ. *See Karlin*, 390 A.2d at 1167; *Whitmyer Bros., Inc.*, 274 A.2d at 581; *Solari Indus., Inc.*, 265 A.2d at 61. The Superior Court in *A.T. Hudson & Co. v. Donovan*, citing *Solari Indus., Inc.*, specifically held paragraph 5(a) of a like contract involving another employee to be valid because it protects the company's legitimate interest in customers with whom it has had substantial dealings. *See A.T. Hudson & Co. v. Donovan*, A-2801-85T1 (App. Div. Super. Ct. N.J. Feb. 2, 1987) at 8-10. The clause at issue here is so broadly written that it prevents Grindeland from rendering services to entities with whom the plaintiff has never had contact and with whom Grindeland himself either has had no contact at all or no contact on the plaintiff's behalf.[6] The only purpose which this provision seems to serve is to suppress competition. I conclude that this provision is against New Jersey law and public policy and is therefore void. Accordingly, I conclude that Grindeland's motion for summary judgment should be granted to the extent the plaintiff's claims against him are predicated on his breach of paragraph 5(d) of the contract.

[6] Paragraph 5(d) prohibits Grindeland for a two-year period from soliciting business from or rendering services to a business entity requiring or seeking services like those provided by the plaintiff of which he had learned during the six-month period prior to his termination even though he had no contact whatever with the entity prior to his termination. A separate clause of the contract deals with potential customers with whom the company has had substantial contact. *See* Contract at & 5(b).

The plaintiff contends that summary judgment on all of Counts One and Two is nevertheless inappropriate because it claims that Grindeland breached provisions of the contract other than the non-competition clause as well as his fiduciary duty to his employer.[7] The court shall render summary judgment if there ``remains no genuine issue as to any material fact" and if ``the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The facts relating to the timing and nature of Grindeland's employment are undisputed and may be summarized as follows: Grindeland was employed by the plaintiff from June 24, 1986 until March 25, 1988. Complaint && 7-8, 23; Answer && 7-8, 23. The parties executed a contract setting forth the terms of the employment. Complaint & 8, Answer & 8. Generally the contract required of Grindeland, among other things, that he faithfully discharge the responsibilities and duties assigned to him, that he devote full time to the performance of his duties, that he not be directly or indirectly employed by or render any advice or services to any other business entity and that all information not generally known in the trade or industry shall be secret and confidential.[8] *See* contract && 1, 3-4. Sometime in early 1988 Grindeland

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[7] Although the provisions of the employment contract are controlled by the law of New Jersey, New Jersey choice-of-law rules require that the remaining tort claims be determined by application of the law of the state with the greatest interest in the resolution of the underlying controversy. *See D'Agostino v. Johnson & Johnson, Inc.*, 559 A.2d 420, 423 (N.J. 1989). Because Maine is the place where the alleged tortious conduct occurred and where Berv is incorporated and has its principal place of business, *see* Affidavit of Elliott J. Berv in Support of Motion to Transfer & 2, I conclude that Maine has the greatest interest in the resolution of the underlying controversy. Accordingly, Maine law applies to these claims. *See id.*; *Restatement (Second) of Conflict of Laws* ' 145 (1971).

[8] The agreement states in relevant part:

> 1. As long as you remain in the employ of the Company, you will faithfully discharge the responsibilities and perform the functions and duties assigned to you by the Company.
>
> . . . .
>
> 3. While you are in the employ of the Company, you shall devote your full time to the performance of your duties and functions for the

decided that he was going to leave the plaintiff's employ and he contacted Berv to inquire about a consulting position. Affidavit of Mark A. Grindeland & 9.

The facts surrounding the circumstances of Grindeland's departure, however, are bitterly disputed. The plaintiff's version of the facts is contained in the declaration of Kathy Purvis and may be

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> Company and will at all times use your best efforts to promote and increase the business and profits of the Company. During that time, you shall not, directly or indirectly, be financially interested in, be employed by, or represent or render any advice or services to any Business Entity which is competitive with the business of the Company. You shall promptly advise the Company of any Business Opportunity which you become aware of at any time during you [sic] employment with the Company.
>
> 4. All information, knowledge and data of or pertaining to the Company or any of its Customers which is not generally known in the trade or industry in which the Company or its Customer (as the case may be) is engaged and which you acquire as a result of or in connection with your employment by the Company, shall be secret and confidential and shall not be used or divulged by you outside of the scope of your employment by the Company expect to the officers of the Company and as the Board of Directors of the Company may otherwise authorize in writing.

summarized as follows: In late February and early March, 1988, while Grindeland was still in the plaintiff's employ and as such was working on a project for Key Bank in Portland, Maine, he began receiving numerous phone calls from an employee of Berv. Declaration of Kathy Purvis && 4, 6. During this period Grindeland admitted to Purvis, his assistant on the Key Bank project, that he was preparing a sales presentation to be given to First NH Banks on behalf of Berv, the purpose of which was to secure a management consulting contract between Berv and First NH. *Id.* at && 5, 7. Grindeland stated that Berv was waiting for First NH's board to approve the contract and that if Berv obtained the contract he would work for Berv and run the project. *Id.* && 7, 9. Grindeland also admitted that he personally made the sales presentation to First NH's officers during the first half of March, 1988. *Id.* & 7. Grindeland acknowledged that if he went to work for Berv there would be legal problems with the plaintiff given the terms of his employment contract. *Id.* at & 8. In mid-March, 1988 Grindeland stated to Purvis that board approval had been received and that he was going to work for Berv. *Id.* & 10. In December, 1988 Purvis became a Berv employee and was assigned to work on a project for a First NH affiliate. *Id.* & 11. During the course of her work it became apparent to her that Berv was using the same documents and techniques as were employed by the plaintiff at Key Bank. *Id.* && 12, 14.

Grindeland's version of the facts differs markedly. He asserts that he decided to leave the plaintiff prior to meeting Elliott Berv (``Elliott''), Berv's president and sole owner, and that he contacted Elliott for the purpose of finding new employment. Affidavit of Mark A. Grindeland & 9; Affidavit of Elliott J. Berv & 1. Grindeland and Elliott held three meetings beginning in late February and extending into mid-March. Deposition of Elliott J. Berv at 36, 41-43, 45-47. During these meetings Grindeland learned from Elliott that Berv had already been hired to perform management consulting work for First NH. Affidavit of Mark A. Grindeland & 4; Deposition of Elliott J. Berv at

49-50, 51. No sales presentation was made to First NH in connection with productivity or quality consulting services. Deposition of Elliott J. Berv at 55. In mid-March Berv and First NH senior staff officers held a meeting so that Berv could describe the services it was going to provide. *Id.* at 55-56. Grindeland attended this meeting but did not speak. *Id.* at 57. By the time this meeting took place Grindeland had already accepted a position with Berv and had agreed to start work on April 4, 1988. *Id.* at 46, 58.

In Maine, the duties applicable to the principal/agent relationship are the same as those applicable to the master/servant relationship. *Baker Bus Service, Inc. v. Keith*, 416 A.2d 727, 731 n.2 (Me. 1980); *see also Restatement (Second) of Agency* ' 2 comment a (1958). Those duties include ``the duty not to act as, or on account of, an adverse party without the principal's consent, [and] the duty not to compete with the principal on his own account or for another in matters relating to the subject matter of the agency." *Restatement (Second) of Agency* ' 13 comment a (1958); *Desfosses v. Notis*, 333 A.2d 83, 87 (Me. 1975). Thus, if the plaintiff's version of the facts is accepted Grindeland breached his fiduciary duty to his employer as well as the provisions of his employment contract which prohibited him from being employed by, rendering advice to or performing services for Berv before he had left the plaintiff's employ. However, if Grindeland's version of the facts is correct he did not breach his employment contract because he did none of these things. I conclude that there are genuine issues of fact regarding the claims that Grindeland breached these contract provisions and his fiduciary duty to the plaintiff.

B. Individual Claims Against Berv

In Count Three of its Complaint the plaintiff alleges that Berv wrongfully induced Grindeland to leave the plaintiff's employ and to breach his employment contract. Berv denies both of these allegations.

Tortious interference with a contractual relationship ``includes as one of its basic elements that the actor act with the purpose of interfering with the contract, that he desire to so interfere, or, under certain circumstances, that he at least know that interference will be a necessary consequence of his action." *Triple-A Baseball Club Assoc. v. Northeastern Baseball, Inc.*, 655 F. Supp. 513, 547-48 (D. Me.) (citing *Restatement (Second) of Torts* ' 766, comment j (1977)), *aff'd in part, rev'd in part*, 832 F.2d 214 (1st Cir. 1987), *cert. denied*, 485 U.S. 935 (1988). Furthermore, in Maine the plaintiff must prove that the tortious interference included an element of fraud or intimidation. *Id.* at 548 (citing *MacKerron v. Madura*, 445 A.2d 680, 683 (Me. 1982)); *see also Harmon v. Harmon*, 404 A.2d 1020, 1023 (Me. 1979); *Taylor v. Pratt*, 135 Me. 282, 284 (1937).

The plaintiff bears the burden of proving at trial that Berv wrongfully induced Grindeland to breach his employment contract. The showing made by Berv in support of its motion for summary judgment is more than sufficient to shift to the plaintiff the obligation ``to go beyond the pleadings and by [its] own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate `specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(c)). This the plaintiff has failed to do. The only evidence submitted on this claim establishes that Berv did not induce Grindeland to breach his contract with the plaintiff. Elliott testified that he would not consider hiring Grindeland for a job until Grindeland made it clear that he would be leaving the plaintiff regardless of whether he retained work with Berv or not. *See* Deposition of Elliott J. Berv at 33-34. Grindeland stated that he made the decision to leave before he contacted Berv. Affidavit of Mark A. Grindeland & 9. Not only does this

evidence fail to establish the foundational element of interference, but the equally necessary element of fraud or intimidation is wholely absent. I conclude that the plaintiff has failed to establish an essential element of its wrongful inducement claim and that Berv's motion for summary judgment should be granted on this issue.

C. Claims Against Both Defendants

In Counts Four and Five of its Complaint the plaintiff claims that both defendants ``willfully and maliciously misappropriated . . . proprietary information and property for their own benefit," Complaint & 49, and that they conspired to compete unfairly with the plaintiff by, among other things, Berv's entry in the management consulting business in direct competition with the plaintiff by utilizing the plaintiff's proprietary techniques furnished by Grindeland, Complaint & 53. The defendants argue that none of the information allegedly misappropriated was proprietary or a trade secret.

Under the Maine Uniform Trade Secrets Act (``Act"), 10 M.R.S.A. '' 1541-48, a trade secret is defined as follows:

> **Trade Secret.** ``Trade Secret" means information, including, but not limited to, a formula, pattern, compilation, program, device, method, technique or process, that:
>
> > **A.** Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
> >
> > **B.** Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

10 M.R.S.A. ' 1542(4). Furthermore, the Law Court has ``explicitly decided as general law that `conspiracy' fails as the basis for the imposition of civil liability absent the *actual commission* of some *independently recognized tort*." *Cohen v. Bowdoin*, 288 A.2d 106, 110 (Me. 1972) (emphasis in original). The defendants have established that the information which the plaintiff claims is proprietary is generally known and readily ascertainable by proper means. *See* Affidavit of Mark A. Grindeland & 8. The plaintiff has failed to sustain its burden of providing specific facts which show that there is a genuine issue as to the proprietary nature of the techniques, forms and knowledge used

by the defendants. *See Celotex Corp.* v. Catrett, 477 U.S. at 324. I conclude that the information used by Grindeland and Berv did not include any trade secrets of the plaintiff as defined by the Act and that therefore the plaintiff has failed to establish an essential element of its misappropriation and conspiracy claims. Accordingly, I recommend that summary judgment be granted on both Counts Four and Five.

D. Conclusion

For the foregoing reasons, I recommend that defendant Grindeland's motion for summary judgment be ***GRANTED*** as to the plaintiff's claim in Count One that Grindeland breached paragraph 5(d) of the contract, ***DENIED*** as to the remaining claims asserted in Counts One and Two, and ***GRANTED*** as to Counts Four, Five and Six, and that defendant Berv's motion for summary judgment be ***GRANTED*** as to Counts Three, Four, Five and Six.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 31st day of May, 1990.

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David M. Cohen
United States Magistrate